Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ROBERT FOSTER WILSON,
a/k/a BOB WILSON,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to review the Georgia Supreme Court's decision that the action of two separate and independent state agencies – one having the custody of a person serving a sentence for a criminal conviction and the other an investigating agency seeking evidence against that person for another unrelated crime – did not violate the due process or right to counsel privileges guaranteed by the Fourteenth and Fifth Amendments of the Constitution of the United States when they deliberately and in concert caused the person in custody to be placed in an inherently coercive atmosphere and subjected him to harassing and extended interrogation about such crime by another inmate under their control and pursuant to their direction?

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Petition For Writ Of Certiorari To The Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Foster Wilson, respectfully prays that a Writ of Certiorari issue to review the judgment of the Georgia Supreme Court entered on June 13, 1994, and the subsequent denial of the Motion for Reconsideration on June 24, 1994.

OPINIONS BELOW

The Superior Court of McDuffie County, Georgia, denied Petitioner's duly filed Motions to Suppress and overruled objections to evidence obtained against him, which he contended violated his constitutional rights

under the Fourteenth and Fifth Amendments to the Constitution of the United States.[1] On June 13, 1994, the Georgia Supreme Court affirmed that decision and held that the conduct complained of did not violate Petitioner's federal rights. (App. 1-10). The Georgia Supreme Court denied Petitioner's Motion for Reconsideration on June 24, 1994. (App. 11).

JURISDICTION

Judgment of the Georgia Supreme Court was entered on June 13, 1994, and reconsideration denied on June 24, 1994. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

(a) Fourteenth Amendment, United States Constitution:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

(b) Fifth Amendment, United States Constitution:

> . . . [N]or shall he be compelled in any criminal case to be a witness against himself, . . .

[1] No written opinion was entered by that Court.

STATEMENT OF THE CASE

On July 16, 1990, Tracie Deaton was found dead at her place of employment in McDuffie County, Georgia. An extensive investigation was immediately begun by agents of the Georgia Bureau of Investigation (GBI). On November 20, 1990, an agent of the GBI first interviewed Petitioner Wilson. On the next day, Petitioner was again interviewed by another agent of the GBI and virtually accused of being the killer but was not arrested. On December 13, 1990, Petitioner was again interviewed by a third agent of the GBI for approximately four hours. That interview was terminated by Petitioner who stated he wanted to talk to an attorney. Approximately two weeks after the December 13 interview, Petitioner's probation on a drug charge was revoked; and he was placed in the custody of the Georgia Department of Corrections, which put him in a minimum security correctional institute.

On July 11, 1991, the GBI agent whose interview had been terminated in December, 1990, when Petitioner expressed his desire to have an attorney, arranged with the prison officials to interview Petitioner on July 16, 1991, the first anniversary date of the victim's death.

At the conclusion of that interview, not having obtained evidence sufficient to charge Petitioner with the crime being investigated, the prison officials and the investigating agents arranged to transfer Petitioner to the State Penitentiary at Reidsville, the State's maximum security facility, where they caused him to be placed in a cell next to one in which they had placed another inmate for the express purpose of attempting to obtain incriminating evidence from Petitioner. Over a period of several

days, Petitioner was interrogated on an ongoing basis by that inmate, who reported from time to time to the officials and ultimately was "wired" by the GBI agents with the consent and cooperation of the prison officials.

After obtaining the report and "wire" from the interrogating inmate, the GBI agents on August 7, 1991, again sought to interview Petitioner, who refused to talk to them without an attorney.

Based primarily on the evidence obtained by the inmate's interrogation, the State obtained an indictment of Petitioner for the murder of Tracie Deaton and crimes related thereto.

Prior to the introduction of the evidence thus obtained, the court heard testimony of the facts surrounding the obtaining of that evidence and orally ruled that it did not violate any of Petitioner's constitutional rights, state or federal, and, over objection, permitted its introduction to the jury who convicted Petitioner of the charges.

Upon appeal to the Supreme Court of Georgia, Petitioner again asserted that the evidence was obtained in violation of his Fourteenth Amendment right to due process and his Fifth Amendment right to counsel. That Court ruled that the method of obtaining that evidence did not violate those rights as interpreted by decisions of this Court and affirmed the conviction. (App. 1-10).

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the Supreme Court of Georgia has decided federal questions in a way that conflicts with applicable decisions of this Court.

In *Miller v. Fenton*, 474 U.S. 104 (1985), this Court held that:

> Certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.

This Court has held that subjecting a defendant to pressures that violate our accusatorial system offends the due process of law clause which the Fourteenth Amendment guarantees. *Rogers v. Richmond*, 365 U.S. 534 (1961). The Georgia Supreme Court held that these cases were not applicable because the "confession" was "voluntary." This Court should review this decision to determine whether the deliberate use of the custodial power over an inmate in removing him from a minimum security facility to a maximum security penitentiary, with its inherent coercive atmosphere, for the express purpose of causing him to be extensively interrogated by another inmate at the direction of the State agents squares with the voluntariness required for confessions or the interrogation techniques permitted by due process.

This Court has also held that under the Fifth Amendment provision against self-incrimination, an accused has a right to counsel during in-custody interrogations prior to the initiation of adversary proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). This Court holds that once a

suspect invokes his Fifth Amendment right to counsel, not only must the interrogation cease, but the police cannot reinterrogate or otherwise initiate contact designed to produce incriminating statements. *Edwards v. Arizona*, 451 U.S. 477 (1981); *McNeil v. Wisconsin*, 501 U.S. 171 (1991).

The Georgia Supreme Court failed to apply the principles in these cases because of the seven-month span between the demand by Petitioner for counsel in December, 1990, and the reinterrogation in July, 1991. In so doing, that court ignores the fact that Petitioner was taken into custody by the state within two weeks of his demand for counsel, remained in custody continuously until the July interrogation, and hardly had the freedom to obtain advice or the service of counsel before being delivered to the GBI agents by his prison custodians for the purpose of being interrogated and also being moved to the penitentiary atmosphere for the purpose of subjecting him to interrogation by another inmate at the direction of the custodial and investigative state agents.

This Court should review this decision and determine whether persons in the position of Petitioner lose the right to counsel privilege of the Fifth Amendment as delineated by decisions of this Court.

CONCLUSION

For all the reasons stated, Petitioner, Robert Foster Wilson, prays that this Court grant a Writ of Certiorari to review the decision of the Supreme Court of Georgia.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: June 13, 1994

S94A0111. WILSON v. THE STATE.

FLETCHER, Justice.

Robert Foster Wilson was convicted of malice murder, robbery, and kidnapping with bodily injury in the stabbing death of Tracie Deaton.[1] He was sentenced to life imprisonment for the malice murder conviction, twenty years for the robbery conviction, and life imprisonment for the kidnapping conviction. The robbery and kidnapping sentences are to run concurrent with each other but consecutive to the sentence for malice murder. He appeals and we affirm.

1. The evidence when viewed in a light most favorable to the verdict shows that during the early morning hours of July 16, 1990, Wilson robbed the White Columns Inn in Thomson, Georgia, forcibly dragged the night clerk into the kitchen and stabbed her to death with a butcher knife. A vehicle with a description matching Wilson's was placed at the scene between the hour the clerk was last seen alive and the time her body was found and fingerprints identified as Wilson's were discovered at the scene.

After the discovery of the homicide, law enforcement officers interviewed Wilson on four occasions: November 20, 1990, November 21, 1990, December 13, 1990 and July

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[1] The homicide occurred on the night of July 16-17, 1990. Wilson was indicted' on August 27, 1991, tried on July 19 through July 23, 1993, and sentenced on July 23, 1993. He filed a notice of appeal on August 6, 1993 and the case was orally argued on January 10, 1994.

16, 1991. Wilson was advised of his *Miranda* rights on each of these occasions. The December 13, 1990 interview was terminated when Wilson invoked his right to counsel. Subsequent to that interview, Wilson was incarcerated for an unrelated offense at Rogers Correctional Institution where the fourth interview took place on the one-year anniversary of the murder. Law enforcement officers initiated this interview which Wilson terminated by indicating only that he did not want to talk to investigators any more.

Within days of the fourth interview, Wilson was transferred to the maximum security facility (Georgia State Prison) at Reidsville, Georgia and placed in a cell next to Thomas Alton Brown. Brown was asked by prison authorities to listen for Wilson to make incriminating statements. Brown engaged Wilson in several conversations over the next week to ten days during which Wilson made several incriminating admissions.

Under the standard of review found in *Jackson v. Virginia,* 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979), the evidence was sufficient for a rational trier of fact to find Wilson guilty beyond a reasonable doubt of each of the offenses for which he was convicted.

2. Wilson contends that the court erred when it refused to suppress his inculpatory statements made to Brown because the state's use of an inmate to "interrogate" him after his request for the assistance of counsel violated his right to counsel under the fifth amendment to the United States Constitution and the corresponding

right in Article I, Section I, Paragraph XVI of the Constitution of the State of Georgia.[2]

In *Escobedo v. Illinois*, 378 U. S. 478, 486 (84 SC 1758, 12 LE2d 977) (1963), the Supreme Court held that an accused has a critical need for legal counsel when being interrogated concerning a crime. The court noted that although such interrogation occurs before indictment, the purpose of the interrogation is to get the accused to confess guilt despite the constitutional right not to do so. Id. at 485. Thus, the court held that an accused has the right to counsel if requested during such an interrogation.

Although *Escobedo* is based on the accused's sixth amendment right to counsel, later opinions recognized that the right to counsel during in-custody interrogations prior to the initiation of adversary proceedings stems from the fifth amendment right against self-incrimination. See *Kirby v. Illinois*, 406 U. S. 682, 689 (92 SC 1877, 32 LE2d 411) (1972). The basic reason for this treatment is that in protecting the right of an accused to not be compelled to bear witness against himself, the unsophisticated layman needs the advice of counsel in order to understand how to exercise the protections provided by the constitution. See, e.g.,

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[2] Wilson does not contend that his fifth amendment rights were violated because Brown did not provide *Miranda* warnings. It is now clearly established that a fellow inmate or an officer posing as a fellow inmate need not give *Miranda* warnings before asking questions that may elicit an incriminating response. *Illinois v. Perkins*, 496 U. S. 292, 300 (110 SC 2394, 110 LE2d 243) (1990).

Escobedo, 378 U. S. at 486 (noting that the accused was unaware of the legal effect of his statements).

In *Miranda v. Arizona*, 384 U. S. 436 (86 SC 1602, 16 LE2d 694) (1966), the Supreme Court established prophylactic rights designed to protect a suspect's constitutional rights and to counteract the "inherently compelling pressures" of custodial interrogation. In this regard, the court held that "if the individual [being questioned] states that he wants an attorney, the interrogation must cease until an attorney is present." Id. at 474. This rule is based on the court's perception

> that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the . . . "right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court. [384 U. S.], at 469.

Arizona v. Roberson, 486 U. S. 675, 682 n.4 (108 SC 2093, 100 LE2d 704) (1988), quoting *Fare v. Michael C.*, 442 U. S. 707, 719 (99 SC 2560, 61 LE2d 197) (1979). Accordingly, once a suspect invokes his fifth amendment right to counsel, not only must the interrogation cease, but the police cannot reinterrogate or otherwise initiate contact designed to produce incriminating statements. *Edwards v. Arizona*, 451 U. S. 477, 484-85 (101 SC 1880, 68 LE2d 378) (1981).

Despite the breadth of a suspect's fifth amendment right to counsel, *Miranda* did not hold that these rights could not be waived. Rather, the Supreme Court has recognized that statements elicited during a custodial interrogation are admissible if the prosecution establishes that the suspect knowingly and intelligently waived his privilege against self-incrimination or his right to counsel. *Miranda*, 384 U. S. at 475; see *Edwards*, 451 U. S. 477. A similar exception to the requirement that all police interrogation cease after the right to counsel is invoked arises where there is a break in custody. Because of the absence or dissipation of coercion once a suspect is released from custody, subsequent confessions obtained from even police initiated interrogation are admissible without violating the suspect's fifth amendment rights if there has been an intervening break in custody. *State v. Bymes*, 258 Ga. 813, 814 (375 SE2d 41) (1989); *Dunkins v. Thigpen*, 854 F2d 394, 397 (11th Cir. 1988); see also *McNeil v. Wisconsin*, 501 U. S. 171 (111 SC 2204, 115 LE2d 158) (1991) ("If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary . . . ").

In the instant case, there was a seven month break in custody between the December 13, 1990 interrogation when Wilson invoked his right to counsel and the time Wilson made the incriminating statements to Brown, and Wilson did not reassert his right to counsel at the July 16, 1991 interrogation. This break in custody precludes Wilson's claim that his incriminating admissions were obtained in violation of his fifth amendment right to

counsel and the court properly refused to suppress such statements on this ground.[3] *Bymes,* 258 Ga. at 814.

3. Wilson contends that even if his incriminating statements are not inadmissible as violative of his fifth amendment rights, they are nevertheless inadmissible as violative of his right to due process. Relying upon the due process clause of the fourteenth amendment, the Supreme Court has held that

> certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect are so offensive to a civilized system of justice that they must be condemned . . .

Miller v. Fenton, 474. U. S. 104, 109 (106 SC 445, 88 LE2d 405) (1985). However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the due process of the fourteenth amendment." *Colorado v. Connelly,* 479 U. S. 157, 167 (107 SC 515, 93 LE2d 473) (1986). In the instant case, Brown's activity in eliciting the incriminating admissions from Wilson was not so coercive as to violate the due process clause. Brown testified that he took part in express questioning of Wilson in an effort to elicit an incriminating response and that he concocted an elaborate story about himself in order to gain Wilson's confidence. There is no evidence, however, that Brown used coercive or threatening devices in interrogating Wilson and the coercive atmosphere of direct police interrogation

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[3] As in *Bymes,* there is no evidence here that Wilson's release from custody was a ploy to seek a waiver of his fifth amendment rights.

is lacking. See *Illinois v. Perkins*, 496 U. S. 292, 296 (110 SC 2394, 110 LE2d 243) (1990). The court correctly admitted Wilson's incriminating statements into evidence.

4. Wilson asserts that both the robbery by force charge and the kidnapping with bodily harm charge merged with his murder conviction.

(a) Robbery is not an included offense of malice murder as a matter of law. Under the evidence, Wilson was the sole perpetrator of both offenses and the separately committed robbery was not an included offense of the separately committed malice murder as a matter of fact. Compare *Burke v. State*, 234 Ga. 512, 515 (216 SE2d 812) (1975). Accordingly, the robbery conviction did not merge into the malice murder conviction and the trial cut [sic] did not err in sentencing Wilson for both offenses.

(b) Kidnapping with bodily injury is not an included offense of malice murder as a matter of law. *Pryor v. State*, 238 Ga. 698, 699 (234 SE2d 918) (1977). Under the evidence, the victim was kidnapped and injured before she was stabbed to death and the separately committed kidnapping was not an included offense of the separately committed malice murder as a matter of fact. *Potts v. State*, 241 Ga. 67, 78-79 (243 SE2d 510) (1978). Accordingly, the conviction for kidnapping with bodily injury did not merge into the malice murder conviction and the trial court did not err in sentencing Wilson for both offenses.

Judgment affirmed. All the Justices concur, except Carley, J., who concurs specially and Hunt, C.J., and Hunstein, J., who concur in judgment only.

S94A0111. WILSON v. THE STATE.

CARLEY, Justice, concurring specially.

I concur fully in the affirmance of appellant's convictions. However, my analysis of the admissibility of the incriminating admissions made by appellant to his fellow inmate Brown differs somewhat from that of the majority.

In Division 2, the majority holds that appellant's incriminating admissions to Brown are not inadmissible under *Edwards v. Arizona*, 451 U.S. 477 (101 SC 1880, 68 LE2d 378) (1981) because there was a "break" in custody. I agree.

> [B]ecause there was a [7]-month break in custody between the initial interrogation [of December 13, 1990, wherein appellant clearly invoked his right to counsel] and [appellant's conversations with Brown after July 16, 1991], and because there is no indication [appellant's] release from custody [on December 13, 1990] was a mere ploy in order to seek another waiver, his Fifth and Fourteenth Amendment rights were not violated under *Edwards v. Arizona*.

State v. Bymes, 258 Ga. 813, 814 (375 SE2d 41) (1989).

However, it should also be recognized that, even if this break in custody were not dispositive, appellant's subsequent incriminating admissions to Brown *still* would not be inadmissible under *Edwards* unless they were the product of "custodial interrogation."

> The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any *custodial interrogation. Absent such interrogation*, there would be *no* infringement of the right [to counsel] that [a defendant has previously]

> invoked and there would [be] no occasion to determine whether there had been a valid waiver [of that previously asserted right]. (Emphasis supplied.)

Edwards v. Arizona, supra at 485-486 (II).

"Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody. . . . " *Miranda v. Arizona,* 384 U.S. 436, 444 (86 SC 1602, 16 LE2d 694) (1966). Appellant was in custody at the time that his incriminating admissions were made. However, he was not in the custody of Brown, who was neither a law enforcement officer nor an agent of the State. *Burgan v. State,* 258 Ga. 512, 515 (5) (371 SE2d 854) (1988). Appellant

> had no reason to feel that [Brown] had any legal authority to force him to answer questions or that [Brown] could affect [appellant's] future treatment. [Appellant] viewed [Brown] as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the [instant crimes, appellant] was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril.

Illinois v. Perkins, 496 U.S 292, 298 (II) (110 SC 2394, 110 LE2d 243) (1990). Indeed, even if Brown had been an undercover officer posing as an inmate, appellant's incriminating admissions still would not be the inadmissible product of "custodial interrogation." "The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow

inmate." *Illinois v. Perkins,* supra at 296 (II). Since "custodial interrogation" is "absent" in the instant case, there was "no infringement" of appellant's previously asserted right to counsel and there is "no occasion" to determine whether appellant made a valid waiver of that previously asserted right. *Edwards v. Arizona,* supra at 486 (II).

In Division 3, the majority holds that the incriminating admissions to Brown are not inadmissible as violative of appellant's due process rights because "Brown's activity in eliciting the incriminating admissions from [appellant] was not so coercive as to violate the due process clause." I agree. "When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. [Cit.]" *Illinois v. Perkins,* supra at 296 (II).

However, it should *also* be recognized that "coercive *police activity* is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." (Emphasis supplied.) *Colorado v. Connelly,* 479 U.S. 157, 167 (II) (107 SC 515, 93 LE2d 473) (1986). In the instant case, there was no "police activity" whatsoever involved in eliciting the incriminating admissions from appellant. Those admissions were elicited by Brown, not by a law enforcement officer or an agent for the State. *Burgan v. State,* supra at 515 (5). "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. [Cits.]" *Colorado v. Connelly,* supra at 166 (II).

SUPREME COURT OF GEORGIA

ATLANTA JUNE 24, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S94A0111

ROBERT FOSTER WILSON a/k/a BOB WILSON V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.